Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CEDRIC JOHNSON,
Petitioner,

v.

GEORGE M. DALEY,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Prison Litigation Reform Act (PLRA) provisions codified in 42 U.S.C. § 1997e(d), which amend 42 U.S.C. § 1988 to reduce the amount of attorney's fees otherwise available to prisoners who prevail in § 1983 actions, violate the equal protection guarantees of the Fifth Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cedric Johnson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The plurality, concurring, and dissenting opinions of the court of appeals sitting *en banc* are reported at 339 F.3d 582 (Pet. App. 1a-75a). The district court's original opinion and order is reported at 117 F. Supp. 2d 889 (Pet. App. 76a-105a). The district court's order on remand is not reported (Pet. App. 106a-109a).

JURISDICTION

The court of appeals ordered a rehearing *en banc* on January 10, 2003 (Pet. App. 114a). The judgment of the court of appeals was entered on August 19, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V. No person shall . . . be deprived of life, liberty, or property without due process of law.

42 U.S.C. § 1988:

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX ... the court, in its discretion, may

allow the prevailing party, other than the United States, a reasonable attorney's fee ....

42 U.S.C. § 1997e:

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that –

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B) (i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 for payment of court-appointed counsel.

STATEMENT OF THE CASE

Cedric Johnson is a prison inmate who, at all times during the course of these proceedings, has been incarcerated by and in the custody of the Wisconsin Department of Corrections (DOC). He suffers from end-stage liver disease. Pet. App. 46a. Johnson brought suit against George M. Daley, the medical director of the DOC Bureau of Correctional Health Services, under 42 U.S.C. § 1983, alleging that Daley had violated his rights under the Eighth Amendment by refusing to allow him to be evaluated for a liver transplant and by repeatedly failing to authorize that his name be added to a transplant list. *Id.* at 4a-5a, 76a. A jury found Daley liable and awarded Johnson $10,000 in compensatory damages and $30,000 in punitive damages. *Id.* at 5a, 76a. The district court also approved a stipulated consent decree requiring that Johnson be added to the transplant list. *See* Stip. and Order (12/10/99) (Pet. App. 110a-113a).

After trial, Johnson moved for an award of reasonable attorney's fees and costs, pursuant to 42 U.S.C. § 1988(b) and Fed. R. Civ. P. 54(d). Pet. App. 77a. Although the amount he sought exceeded the maximum attorney's fees permitted under both 42 U.S.C. § 1997e(d)(2) (which limits attorney's fees to 150% of the judgment) and § 1997e(d)(3) (which limits an attorney's hourly rate to 150% of the rate allowed for court-appointed counsel under the Criminal Justice Act), Johnson contended that the PLRA fee limitations violated his equal protection rights under the Constitution. Pet. App. 77a.

The district court agreed with Johnson, holding that the PLRA's limitations on attorney's fees violate the equal protection guarantees of the Fifth Amendment because the government's stated interests were "not rationally related to § 1997e(d)'s differential treatment of

successful prisoner civil rights plaintiffs and successful non-prisoner civil rights plaintiffs." *Id.* at 78a. The district court therefore determined "reasonable" attorney's fees without regard to the limitations set forth in 42 U.S.C. § 1997e(d)(2) and (3), and ordered Daley to pay $88,578.81 in attorney's fees and costs. *Id.* at 100a, 105a.

Daley (and intervenor United States) appealed the district court's award of attorney's fees to the extent that it exceeded the amount permitted by the PLRA, but did not appeal the underlying judgment of liability. *Id.* at 6a. The appeal was argued to the United States Court of Appeals for the Seventh Circuit on April 19, 2001. Prior to issuing an opinion, the court ordered a rehearing *en banc* (*id.* at 114a); the appeal was reargued *en banc* on April 8, 2003. *Id.* at 1a.

The *en banc* Seventh Circuit reversed the judgment of the district court by a five-judge plurality, with one judge concurring and five judges dissenting. *Id.* at 32a. Judge Easterbrook, writing for the plurality, held that "§ 1997e(d) is rationally related to valid objectives and hence is within the legislative power, whether or not it is wise." *Id.* at 2a. Five justices dissented, finding that the PLRA's limitations were not rationally related to any of the proffered governmental interests, and thus were not constitutional. *Id.* at 36a-74a (Rovner, J., dissenting); *id.* at 74a-75a (Flaum, C.J., dissenting).

On remand, the district court recalculated the award of attorney's fees by applying 42 U.S.C. § 1997e(d). Order (9/26/03) (Pet. App. 106a-109a). The defendant was ordered to pay $36,639.00 in attorney's fees, plus costs and out-of-pocket expenses. *Id.*

REASONS FOR GRANTING THE PETITION

I. The United States Court Of Appeals For The Seventh Circuit Decided An Important Federal Question In A Way That Conflicts With Relevant Decisions Of This Court.

In upholding the PLRA fee limitations, the Seventh Circuit failed to follow this Court's well-established equal protection jurisprudence. First, the court misapplied this Court's precedents in determining who is "similarly situated" to a prevailing prisoner civil rights plaintiff for purposes of equal protection analysis. Second, the court failed to follow this Court's precedents in finding that the PLRA provisions survived rational basis review. Because the Seventh Circuit's analysis was materially flawed in both of these respects, the Court should grant this petition pursuant to Supreme Court Rule 10(c).

A. The Plurality Misapplied This Court's Precedents in Determining Who Is "Similarly Situated" for Purposes of Equal Protection Analysis.

In answering the preliminary question of "equal *with respect to what*?," Pet. App. 10a, the plurality compared prisoners who prevail in § 1983 actions to a number of other groups, including ordinary tort litigants, *id.* at 11a-12a, Medicaid recipients, *id.* at 12a-13a, veterans seeking medical care, *id.* at 13a-14a, persons claiming Social Security benefits, *id.* at 14a, and school children and parents seeking better education under the Individuals with Disabilities Education Act, *id.*

As Chief Judge Flaum and Judge Rovner noted in separate dissents, a comparison of the groups actually impacted by the PLRA limitations highlights the

infirmities of those provisions. The proper comparison, according to Chief Judge Flaum, is "between former prisoners bringing suit for violations that occurred during their imprisonment and current prisoners bringing suit for identical violations," as the PLRA does not apply to *former* prisoners. *Id.* at 74a (Flaum, C.J., dissenting). In other words, the applicability of the PLRA fee limitations depends on *when* a plaintiff files an action: if he brings suit while he is in prison, his attorney's fees are subject to the fee limitations of § 1997e(d); if he waits until he is released from prison to bring suit for the identical violation, attorney's fees are available under § 1988 without regard to the PLRA's limitations. *See Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (prisoner under §1997e(h) does not include a felon who has been released from prison).

Suppose, for example, that a prisoner is beaten by a prison guard and files suit under 42 U.S.C. § 1983. Further suppose that the prisoner prevails on his claim and is awarded $10,000 in damages. Under 42 U.S.C. § 1997e(d)(2) (which limits attorney's fees to 150% of the judgment), attorney's fees would be capped at $15,000; under § 1997e(d)(3) (which limits an attorney's hourly rate to 150% of the rate allowed for court-appointed counsel under the Criminal Justice Act), the attorney's fees could be capped at an even lower amount, depending on how much time the attorneys devoted to the case.

In the alternative, suppose that the same prisoner is beaten by a prison guard and, shortly thereafter, is released from prison. Further suppose that the former prisoner then files suit under § 1983, prevails, and is awarded $10,000 in damages. Because the PLRA does not apply to *former* prisoners, the amount of attorney's

fees available is governed by § 1988. Under that statute, the plaintiff may be awarded a "reasonable attorney's fee," regardless of the limitations imposed by the PLRA. When the treatment of prisoners under the PLRA is compared to those who truly are "similarly situated," the disparities are impossible to justify.

Judge Rovner, also writing in dissent, compared *prisoner* and *nonprisoner* civil rights plaintiffs seeking fees under 42 U.S.C. § 1988. *Id.* at 38a (Rovner, J., dissenting). She concluded that this was the proper comparison for equal protection purposes because the PLRA specifically targets a sub-group (prisoners) of prevailing plaintiffs in § 1983 actions and limits the amount of attorney's fees that may be awarded in cases brought by that sub-group. *Id.* at 42a.

Judge Rovner's dissent also pointed out the arbitrary nature of the plurality's approach by posing a hypothetical:

> Suppose instead of limiting fees for prisoners, the PLRA reduced the availability of fees under § 1988 for all blue-eyed litigants. Under the plurality's reasoning, there would be no equal protection problem with that statute. The same arguments used to justify the restriction for prisoners would apply to blue-eyed litigants . . . . Yet most rational people would balk at the suggestion that Congress could, consistent with equal protection, single out persons with a certain eye color and deny them the same attorney's fees as all other litigants pursuing the same constitutional claims.

Id. at 42a-43a. In her view, the plurality's "detour" into other types of cases "ignores the proper focus, which is

on the classification itself viewed in the context of the statute authorizing fees for that particular cause of action." *Id.* at 43a. Equal protection analysis is not an open forum for a court to consider the fairness of a provision when compared to other, unrelated statutes. *Id.* at 38a-39a.

The PLRA's distinction between prisoner and *former* prisoner (or nonprisoner) civil rights plaintiffs flies in the face of this Court's decision in *Rinaldi v. Yeager*, 384 U.S. 305 (1966). In *Rinaldi*, this Court found unconstitutional a state law requiring prisoners who unsuccessfully appeal their convictions to reimburse the county for the cost of the trial transcript; the law did not impose this requirement on persons who unsuccessfully appealed from a suspended sentence, fine, or probation. *Id.* at 308. The Court held that "[t]o fasten a financial burden only upon those unsuccessful appellants who are confined in state institutions . . . is to make an invidious discrimination." *Id.* at 309. The Court reasoned that:

> There is no defensible interest served by focusing on that distinction [between institutionalized appellants and those not institutionalized] as a classifying feature in a reimbursement statute, since it bears no relationship whatever to the purpose of the repayment provision.

Id.

The plurality opinion found that this Court's decision in *Rinaldi* was distinguishable from the case at hand, explaining that *Rinaldi* involved an "unreasoned distinction" whereas § 1997e(d) does not. Pet. App. 30a. The plurality went on to explain that *Rinaldi* is among an old line of cases that has since been limited to protect

only the rights of defendants. *Id.* at 30a-31a. This Court, however, has never limited *Rinaldi* in this way; if the reach of precedent is to be modified, it is for this Court—and not for a plurality of the Seventh Circuit—to perform such a function.

Contrary to the plurality's treatment of *Rinaldi*, the dissent found the case to be controlling:

> The government asserts an interest in diminishing the fiscal burden of fees on the states, and also in decreasing the costs associated with defending and monitoring compliance in cases of meritorious litigation. There is no rationality, however, in imposing such a restriction on attorneys representing institutionalized persons, because the locale of the litigant is unrelated to the fiscal objective. Although Congress can approach a problem piece-meal, there is no attempt in the briefs to explain why inmates should be singled out over non-inmates for the restriction in cases involving meritorious litigation . . . . There is no rational basis to connect inmate status with the goal of reducing the fiscal burden any more than Congress could single out blue-eyed litigants and restrict their fees. The classification itself has to be related to the interest asserted, and it is not. Congress in enacting the PLRA was concerned with the flood of frivolous litigation, not the flood of meritorious litigation. There is simply no basis in the record or in theory upon which we could hold that meritorious litigation by prisoners is creating an economic burden justifying the singling out of inmates for this type of

> restriction. There is, in short, no connection between the fiscal goals of the statute and the status of the meritorious litigant as either an inmate or a non-institutionalized individual.

Id. at 72a-73a (Rovner, J., dissenting). The plurality's novel and misguided approach to determining who is "similarly situated" to the disadvantaged class in this case skewed its entire analysis and produced a result wholly inconsistent with this Court's precedents.

B. The Plurality Failed to Follow This Court's Well-Established Precedents in Performing the Rational Basis Inquiry.

The plurality opinion failed to correctly interpret and follow this Court's precedents in its application of the rational basis standard. For example, the plurality misinterpreted *Lindsey v. Normet*, 405 U.S. 56 (1972), in which this Court considered whether there was a rational relationship between the government's interest in reducing frivolous appeals and a state statute requiring tenants challenging eviction proceedings to post a bond equal to twice the amount of the rent that would accrue, and to forfeit the double-bond if they lost on appeal. *Id.* at 64, 75. Ordinary civil litigants, by contrast, did not have to comply with the double-bond requirement; rather, they were required to file an undertaking with a surety to cover any adverse judgment on appeal. *Id.* at 74-75. The Court found that the statute did not pass rational basis review, concluding that the double-bond requirement "not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.* at 78.

The plurality narrowly limited *Lindsey* as holding that "a state may distinguish eviction suits from other

litigation about property and may require tenants to post bonds for the rent accruing pending decision," and that "[i]ndigent litigants unable to post bonds for accrued rent may lose the litigation summarily." Pet. App. 31a. The plurality thus concluded that *Lindsey* establishes that "forcing one party . . . to pay extra . . . to the adversary as a condition of receiving a decision on the merits violates the Constitution." *Id.* Based on this narrowing interpretation, the plurality distinguished *Lindsey* from this case, holding that, unlike the statute in *Lindsey*, "the PLRA does not compel the defendant to pay extra (compared with § 1988) as a condition of receiving a decision on the merits." *Id.* at 32a.

The dissent rejected the plurality's treatment of *Lindsey*, explaining that the Court had recognized in that case that—although a state need not provide a right to appellate review—"when an appeal is afforded, equal protection require[s] that the right not be arbitrarily and capriciously granted to some litigants and not others." *Id.* at 68a (Rovner, J., dissenting). The dissent noted that the PLRA presented a similar issue: although Congress did not have to provide a mechanism for awarding attorney's fees, "once provided the fees cannot be arbitrarily and capriciously denied to one class of litigants without violating equal protection." *Id.*

The dissent argued that the Court's reasoning in *Lindsey* was applicable to the PLRA in other ways as well, focusing on the facts that the landlord was already protected by the undertaking for accrued rent and that the statute was both over-inclusive and under-inclusive because it would prevent nonfrivolous appeals and allow meritless appeals, based on who could afford the double-bond. *Id.* at 68a-69a. According to the dissent:

Lindsey's criticisms parallel the problems presented by the PLRA. The asserted interests in deterring frivolous and trivial litigation are already covered by § 1988, which does not allow any fees at all in such cases. In that context, the limitation on the amount of fees is meaningless for those type of cases. Moreover, the PLRA inevitably impacts the non-trivial, meritorious civil rights cases which Congress claims no interest in deterring. The impact of the 150% limitations are magnified in the prison context, where damage awards are consistently lower than are provided in actions by non-prisoners and where the risk of no recovery is much greater. By linking fees to a percentage of those lower damages, the fee has a greater adverse impact in the prison context than might be experienced in non-prisoner litigation. Finally, the fee restrictions at issue in this case are just two of a number of other restrictions on fees in § 1997e(d). Section 1997e(d)(1) limits the fee amount in two ways: the fee must be directly and reasonably incurred in proving an actual violation, and the amount must be proportionately related to the court ordered relief or directly and reasonably incurred in enforcing the relief ordered for the violation. Therefore, the 150% cap on total fees and on the hourly rate will in all cases operate to reduce the fee award below that baseline amount of fees that were directly, reasonably incurred and proportionate to the relief ordered. This impact further undermines the arguments made in this case. The fee restrictions have no impact on the frivolous and

> trivial cases, and operate only to reduce the fee award in meritorious litigation below the amount that was both reasonably incurred and proportionate to the relief. The restrictions therefore lack the fit between classification and governmental interest that is necessary to ensure that the classification is not drawn for the purpose of disadvantaging the group burdened by the law. The fit between means and ends is even more attenuated in this case than in *Lindsey*, and therefore the PLRA fee restrictions violate equal protection.

Id. at 69a-70a (citations omitted).

The plurality also failed to acknowledge the applicability of this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996). That case involved an amendment to the Colorado constitution repealing various ordinances prohibiting discrimination on the basis of sexual orientation. *Id.* at 623-24. This Court found that the amendment lacked a rational relationship to legitimate state interests, as it (1) "has the peculiar property of imposing a broad and undifferentiated disability on a single named group"; and (2) "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . . ." *Id.* at 632.

That prisoners are an unpopular group cannot be disputed. Pet. App. 48a (Rovner, J., dissenting) (noting "the deep-seated societal antipathy towards prisoners as a class"). As this Court explained in *Romer*, if "equal protection of the laws" is to have any meaning, "it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." 517 U.S. at 634 (internal

quotation marks omitted); *see also Lawrence v. Texas*, 123 S. Ct. 2472, 2485 (2003) (O'Connor, J., concurring in judgment).

The district court concluded that, because the attorney's fees limitations in the PLRA are not rationally related to any of the proffered governmental interests, "[t]he inevitable inference is that the law is 'born of animosity toward the class of persons affected.'" Pet. App. 99a (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)). The plurality simply ignored that finding, in direct contravention to *Romer*.

II. The United States Court Of Appeals For The Seventh Circuit Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court.

The constitutionality of 42 U.S.C. § 1997e(d)(2) and/or 42 U.S.C. § 1997e(d)(3) is an important issue of federal law that has been considered by the First, Third, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuit Courts of Appeals. While there is not a true "circuit split" on whether these provisions violate equal protection guarantees, the need for this Court to settle the issue is evidenced by the numerous dissenting judges who have found the provisions to be unconstitutional. In addition, several of the federal circuit courts of appeals that have addressed this issue have engaged in little analysis or have focused too narrowly in reaching their decisions. Because of the deep-seated disagreement on the issue, this Court should resolve this important

question of federal law.[1]

A. The Constitutionality of the PLRA Attorney Fee Limitations is an Important Issue of Federal Law.

The attorney's fees limitations codified in the PLRA will "have a significant, predictable impact on the ability of prisoners with meritorious cases to obtain representation." Pet. App. 74a (Rovner, J., dissenting). Rather than affecting prisoners who bring frivolous suits, the restrictions will affect *only* prisoners with meritorious claims for whom the courts are unable to secure representation (because of the caps). *Id.* Thus, contrary to the purposes of the civil rights laws, prisoners whose constitutional rights are violated will be without a meaningful remedy. *Id.* Because of the deep-seated animus towards prisoners as a class, this Court's intervention is necessary to protect the rights of this subset of civil rights plaintiffs.

B. Federal Appellate Judges Are Divided on the Constitutionality of the PLRA Attorney Fee Limitations.

Numerous judges on the federal courts of appeals have found the PLRA fee limitations to violate the Fifth Amendment's equal protection guarantees. The two *en banc* panels (in the Third and Seventh Circuits) to consider the constitutionality of § 1997e(d)(2) collectively voted to uphold the provision only by a slim 12-11 margin. The sharp division among the appellate

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[1] This Court has, at times, overruled nearly uniform precedent in the lower courts. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000); *McNally v. United States*, 483 U.S. 350 (1987).

judges faced with this issue demonstrates the need for this Court's resolution.

1. The Seventh Circuit.

As noted above, the Seventh Circuit's *en banc* panel was divided on the constitutionality of the PLRA's limitations on fees, mustering a 5-judge plurality in favor of upholding the provisions, with a single judge concurring and five judges dissenting. The plurality, rejecting the district court's position, found that, "because prisoners litigate even frivolous claims to excess," a legislature could rationally conclude that "[prisoners] do not need any extra incentive to litigate meritorious claims." Pet. App. 23a.

In finding that the PLRA provisions were rationally related to legitimate government interests, the plurality further concluded that "a legislature could believe that, even if the law has *no* effect on plaintiffs, its effect from defendants' perspective . . . is a public benefit," *id.* at 26a; that "a legislature rationally could conclude that some prisoners will respond to the adjustments," *id.*; that "Congress rationally could believe that the size of the expected recovery influences some prisoners' decisions about how to allocate their time," *id.* at 27a; and that a legislature could rationally conclude that "a small reduction in weak, trivial, or bogus suits is worth achieving even at some potential cost to prisoners' ability to prevail in the less common meritorious suit," *id.*

The plurality further found that Congress has the ability to legislate "one step at a time," and therefore may modify the laws for a single subset of individuals (here, prisoners). *Id.* at 27a-30a. As the plurality noted, Congress could have believed that all fee awards under § 1988 are excessive, and targeted prisoner litigation as "an appropriate place to explore the results of a cutback."

Id. at 27a.

Judge Rovner, writing in dissent, rejected the plurality's reasoning and argued that the PLRA fee limitations were not rationally related to *any* of the proffered governmental interests: (1) deterring frivolous lawsuits; (2) regulating the filing of suits based on trivial harms; (3) protecting the public fisc; (4) regulating federal court intervention into States' management of their prisons; and (5) preventing windfall fee awards. *Id.* at 57a. The dissent also concluded that the provision was unconstitutional because "[t]he government does not purport to have a legitimate interest in deterring prisoners from filing meritorious suits, nor could it." *Id.* at 38a.

As the dissent explained with respect to the first two interests enumerated above (deterring frivolous suits and suits based on trivial harms):

> The journey from the PLRA fee restrictions to the reduction in trivial or frivolous filings . . . requires so many leaps, many ridiculous, as to destroy any semblance of rationality. To believe that the fee restriction impacts the filing decision of *pro se prisoners*, Congress would have to believe that (1) prisoners would be inclined to bring frivolous or trivial lawsuits *and* (2) those prisoners would not be deterred from filing such suits by the likelihood that their own damages would be minimal or non-existent but (3) those prisoners would be deterred from filing those suits by the prospect that the fees available to their as-then non-existent attorneys were restricted under the PLRA even though (4) those attorneys would not have been entitled to fees for such suits even absent the PLRA and even though (5) the

chances of those prisoners ever obtaining counsel was practically nil, given that only 1% of prisoner civil rights cases involve private attorneys, and another 4% involve appointed counsel (who presumably would not be appointed for our hypothetical trivial/frivolous cases). Such a belief is fanciful, not rational. In the alternative, to believe that the fee restriction impacts the decision of *private attorneys* bringing suits on behalf of such prisoners, Congress would have to believe that (1) there are private attorneys who are willing to bring suits on behalf of prisoners despite the difficult standards of proof and the absence of traditional damages such as lost wages and future earnings and (2) those attorneys would file a trivial or frivolous lawsuit even though fees for such lawsuits are not available under § 1988 but (3) those same attorneys would decide not to file the law suit once fees were merely restricted under the PLRA. This sequence is made even more ridiculous considering that only 1% of all prisoner civil rights litigation involves private attorneys, including groups such as the ACLU, but yet we are asked to believe that Congress rationally could think those attorneys are choosing to bring the frivolous or trivial lawsuits and would be deterred from that course by the fee restriction under the PLRA but not the fee prohibition under § 1988. If this connection is a rational one, then this test truly has lost all meaning.

Id. at 37a-38a (citations omitted).[2]

With respect to the remaining proffered interests—reducing federal court intervention into state prison systems, preventing windfall fee awards, and protecting the public fisc—the dissent found that these justifications were similarly focused on the effects of *meritorious* litigation. *Id.* at 70a-71a. For example, federal intervention would occur where a consent decree was entered—an event that would only take place if the prisoner litigation were successful. *Id.* at 70a. Furthermore, while the public fisc would be protected by lower fee awards, "[s]imilar savings could be obtained if Congress passed a similar fee restriction applicable to all blue-eyed litigants." *Id.* at 71a. Because equal protection requires "some rationality in the nature of the class singled out," the dissent found the PLRA limitations to be unconstitutional. *Id.* (internal quotation marks omitted).

2. The Third Circuit.

The Third Circuit sitting *en banc* split evenly (6-6) on the issue of whether § 1997e(d)(2) (the limitation of attorney's fees to 150% of the judgment) is constitutional. *Collins v. Montgomery County Bd. of Prison Inspectors*, 176 F.3d 679, 686 (3d Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000). This equal division of the Third Circuit had the effect of affirming the district court to the extent that it upheld the provision. *Id.* In

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[2] *See also* Pet. App. 91a-92a (opinion of the district court) (finding that arguing that the fee caps deter frivolous suits "is a little like arguing that a rational response to the problem of a dusty toaster is to put a cover over the coffee pot. The presumed 'fit' between problem and solution is illusory.").

discussing the constitutional questions, however, the court did not explain the reasoning of the judges who found the provision constitutional nor the reasoning of the judges who found the provision unconstitutional; there was no discussion of legitimate government interests or their relationship to the challenged fee limitations.

The Third Circuit did not reach the issue of whether the hourly rate limitation of § 1997e(d)(3) was constitutional, finding instead that this issue was moot in light of its disposition on § 1997e(d)(2). *Id.* Because, in that case, the fees permitted under the hourly rate provision standing alone would exceed the fees permitted under the provision limiting fees to 150% of the judgment, the court noted that even if the hourly rate limitation were invalidated, the fees allowed could not exceed the § 1997e(d)(2) cap. *Id.*

3. The Sixth Circuit.

The Sixth Circuit has heard argument on the constitutionality of 42 U.S.C. § 1997e(d)(2) and (3) in two separate cases, by two different three-judge panels. *See Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001), *cert. denied*, 535 U.S. 1095 (2002) (addressing § 1997e(d)(2)); *Hadix v. Johnson*, 230 F.3d 840 (6th Cir. 2000) (addressing § 1997e(d)(3)). In both of these cases, the panel was divided, with two judges upholding the relevant provision and one judge who would have struck it down.

The Sixth Circuit first addressed the constitutionality of the hourly rate limitation of the PLRA (§ 1997e(d)(3)). *See Hadix*, 230 F.3d at 842. The two-judge majority in that case found that the provision was rationally related to the government interest in decreasing marginal or trivial lawsuits, because "in lowering the fee recoverable

if the claim succeeds, attorneys are likely to demand a more meritorious claim to make the representation worthwhile." *Id.* at 845. And, while some prisoners would pursue marginal claims even without the aid of an attorney, the court found that it was reasonable to conclude that at least some prisoners would be dissuaded from pursuing an action without counsel. Congress could have furthermore found that a reduction in marginal and frivolous claims would protect the public fisc. *Id.* at 844-45. Thus, "[a]lthough the means that Congress employed do not tightly fit the ends it sought to achieve," the majority found that the provision survived rational basis review. *Id.* at 847.

One judge dissented in *Hadix*, concluding that there was no rational relationship between the PLRA limitation and any legitimate legislative purpose. *Id.* (Jones, J., dissenting). The dissent criticized the majority for "disconnecting the attorneys' fee cap mandated by [42 U.S.C. § 1997e(d)(3)] from the fees otherwise available under 42 U.S.C. § 1988." *Id.* When looking at § 1997e(d)(3) "through the lens of the fees otherwise available under § 1988," the dissent found that there is no rational basis for the statute. *Id.* Because § 1988 only allows a "prevailing party" to be awarded reasonable attorney's fees, fees are not permitted for frivolous or trivial lawsuits. *Id.* at 847-48. The dissent concluded:

> Given that § 1988 does not permit a fees award for frivolous or trivial suits, the fees limitation of [§ 1997e(d)(3)] cannot be rationally related to either of these purposes. Moreover, unless reducing the meritorious, non-trivial claims of prisoners is a legitimate constitutional objective, which has not been averred by any of the parties, the derivative objectives advanced

> by the parties -- preserving governmental resources, reducing prisoner incentives to file § 1983 actions, and reducing federal oversight of state prisons -- are similarly not rationally related to [§ 1997e(d)(3)].

Id. at 848.

Less than a year after *Hadix* was decided, the Sixth Circuit again addressed the constitutionality of a PLRA limitation on attorney's fees, this time the provision limiting fees to 150% of the judgment (§ 1997e(d)(2)). *Walker*, 257 F.3d at 667. The two-judge majority found *Hadix* to be dispositive, holding that the limitations on attorney's fees were rationally related to the legitimate government interests in decreasing marginal suits and protecting the public fisc. *Id.* at 669. At the same time, the majority voiced concern about its potential effects:

> We are aware that § 1997e(d)(2) will have a strong chilling effect upon counsels' willingness to represent prisoners who have meritorious claims. We are also mindful that the "marginal or trivial" claims that result in a judgment for a prisoner . . . do in fact arise out of an actual, proven civil rights violation. We admit to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual, albeit "technical," civil rights violations.

Id. at 670. Despite these concerns, the majority concluded that § 1997e(d)(2) survived rational basis review. *Id.*

Again, one judge dissented in part, finding that § 1997e(d)(2) violated equal protection guarantees because it was not rationally related to *any* of the proffered government interests in: (a) reducing frivolous litigation; (b) deterring trivial or inconsequential suits; (c) reducing intervention of federal courts into prison management; (d) preventing windfall fee awards for attorneys; (e) protecting the public fisc; (f) limiting disruption from prison litigation on prison operations; or (g) curbing prior abuses under § 1988. *Id.* at 675-80 (Daughtrey, J., dissenting).

As to the first interest—reducing frivolous litigation—the dissent found that because attorney's fees are only awarded to a "prevailing party," a cap on fees "bears absolutely no logical relationship to a desire to eliminate suits that by definition have no chance of succeeding." *Id.* at 676. Similarly, the cap would not deter prisoners from bringing trivial or marginal lawsuits, as "[a]lmost all prisoner civil rights cases are now filed pro se, pro bono, or by dedicated public interest organizations." *Id.* "Equally unpersuasive" was the third proffered interest, that of reducing federal court intervention into states' prisons; the dissent found that state officials are still subject to the Constitution and, "[t]o the extent that litigants are able to establish constitutional violations by prison officials, the courts are duty-bound to rectify those transgressions." *Id.* at 677.

The dissent similarly rejected the fourth proffered interest, that of preventing windfall fee awards, as § 1988 was already designed to prevent any such windfall by permitting attorneys to recover only the reasonable value of their services. *Id.* at 677-78. As to the government interest in protecting the public fisc, the dissent noted that because Congress permits fee awards in § 1983

actions, it cannot arbitrarily single out a particular class of § 1983 plaintiffs to whom § 1988 does not apply; to do so "trivializes constitutional protections, [and] discriminates in an irrational and unjust manner." *Id.* at 679. The dissent found that the sixth interest—limiting disruption from prison litigation on prison operations—was also unpersuasive; because prisoners are free to file suit pro se, "prison officials will not be insulated by an attorneys' fee cap from demands on their time for administrative hearings, depositions, and court proceedings." *Id.* Finally, the dissent rejected the suggestion that a fee cap would curb abuses of § 1988, as "[the] vindication of constitutional rights is not always quantifiable solely by monetary damage awards," and courts are required to consider numerous factors (including but not limited to the relief ordered) in making a fee award. *Id.*

After rejecting each of the proffered government interests, the dissent addressed the majority's position that *Hadix*—which addressed § 1997e(d)(3)—was controlling on the constitutionality of § 1997e(d)(2). *Id.* at 679-80. The dissent rejected this position, opining that the two provisions "are radically different in their import" and that "the arguments supporting the rationality of one piece of the legislation do not necessarily apply in the other." *Id.* at 680. Thus, the dissent found that the provision "violates Equal Protection guarantees by treating prisoner and non-prisoner litigants differently." *Id.*

4. Other Federal Appellate Decisions

As the decisions of the Seventh, Third, and Sixth Circuits indicate, there is substantial disagreement on the issue of the constitutionality of the PLRA attorney's fees limitations. While panels of the First, Eighth, Ninth, and

Eleventh Circuits have upheld one or both of the provisions at issue in this petition, those courts generally provided little analysis in their opinions, and, in some instances, only addressed one of the two provisions at issue in this case. The opinions of these courts are summarized below.

The First Circuit has only considered the constitutionality of § 1997e(d)(2), and has not specifically addressed § 1997e(d)(3). *See Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000). In discussing § 1997e(d)(2), the court gave conclusive effect to the government interests in "discouraging frivolous suits, protecting the public fisc, and bringing prisoner incentives to litigate more in line with non-prisoner incentives." *Id.* at 44 (footnote omitted). The court did not separately analyze these interests, noting that "the prison setting is sui generis," and that "Congress's choice to treat prisoners differently than non-prisoners is plainly justified by the idiosyncratic characteristics of that setting." *Id.*

The court rejected the argument that the fee limitation would not deter frivolous suits because fees are only available to prevailing parties, noting:

> Common sense suggests that this ex post view is untenable. Congress presumably feared the motivating effect of the prospect of attorneys' fees, ex ante, and the fee cap quells that effect by capping the potential payoff. This changes the odds and forces both lawyer and client, out of self-interest, to assess likely outcomes with greater care before filing a suit that, even if nominally successful, might leave them holding a nearly empty bag.

Id. at 45. The First Circuit failed, however, to acknowledge that § 1988 already prohibits *any* award of fees in frivolous actions (and that sanctions may be imposed for filing such actions), and thus a fee limitation does not add any deterrent to filing frivolous suits. Thus, the only *ex ante* effect of the limitation would be on prisoners deciding whether to file a non-frivolous suit (in which attorney's fees might be recoverable).

The Eighth Circuit—like the First Circuit—only has addressed the constitutionality of § 1997e(d)(2), and has not considered § 1997e(d)(3). *See Foulk v. Charrier*, 262 F.3d 687, 704 (8th Cir. 2001). In upholding § 1997e(d)(2), the court engaged in no independent reasoning, merely stating in conclusory terms that it "agree[d] with the majority of circuits . . . that the PLRA's attorney's fees cap [§ 1997e(d)(2)] passes constitutional muster," and quoting a portion of the Sixth Circuit's opinion in *Walker v. Bain*. *Id.*

The Ninth Circuit similarly provided little reasoning for upholding the PLRA fee limitations. *See Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999). The court found that "the government's interest was apparently to curtail frivolous prisoners' suits and to minimize the costs . . . associated with those suits." *Id.* (footnote omitted). The court concluded that there was no denial of equal protection because it was "conceivable" that prisoners file a disproportionate number of frivolous lawsuits, and that "[s]uch speculation is sufficient for a rational-basis examination; there is no need for evidence or empirical data." *Id.* There was no discussion, however, of how the attorney's fees limitations of the PLRA are rationally related to the government's interest in deterring frivolous prisoner litigation.

The Eleventh Circuit also engaged in minimal analysis in concluding that "§ 1997e(d) survives rational basis review." *See Jackson v. State Bd. of Pardons and Paroles*, 331 F.3d 790, 798 (11th Cir. 2003), *cert. denied*, 72 U.S.L.W. 3241 (Oct. 6, 2003). The court found that Congress had an interest in decreasing "marginal or trivial lawsuits" and in protecting the public fisc. *Id.* The court went on to conclude that Congress could have reasonably found that the fee limitations would dissuade attorneys from taking marginal or trivial cases, thereby preserving some government resources. *Id.* The court did not acknowledge, however, that nearly all represented prisoners obtain counsel via court appointments, and that courts do not appoint attorneys in trivial or marginal cases.

CONCLUSION

The constitutionality of the PLRA's limitations on attorney's fees is an important question of federal law that should be addressed by this Court. The need for this Court to grant certiorari is heightened by the Seventh Circuit's failure to properly follow this Court's equal protection jurisprudence, as well as by the strong disagreement among the federal appellate judges who have addressed this question. For these reasons, petitioner respectfully requests that this Court grant this petition for a writ of certiorari.

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